MOHD AMIN ABDULLAH *a*

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
KC VOHRAH J
[CRIMINAL APPEAL NO: 41-25-95]
25 APRIL 1998

CRIMINAL PROCEDURE: *Close of prosecution - Standard of proof - Duty of trial judge - Whether to undertake a maximum evaluation of evidence - Application of prima facie test - Whether a serious misdirection - Whether vitiating the conviction - Rules relating to burden of proof - Whether constituting rules of substantive law - Breach thereof - Whether incapable of being cured - Criminal Procedure Code, s. 422* *c*

The appellants herein were charged with offences under ss. 182 and 499 respectively of the Penal Code and were tried before two magistrates in succession. The trial took place before the Supreme Court decision in *Khoo Hi Chiang v. Public Prosecutor,* and that being so, at the close of the prosecution case, the learned second magistrate applied the *prima facie* standard of proof, before calling for the appellants' defence. In this appeal against their conviction(s) and sentence(s), the appellants argued that the learned second magistrate, in so adverting to the *prima facie* test at the close of the prosecution case, had misdirected herself in law, as the Supreme Court in *Khoo Hi Chiang,* and subsequently the Federal Court in *Arulpragasan Sandaraju v. Public Prosecutor,* had rejected the *prima facie* test, and had opted instead for proof beyond reasonable doubt, namely, that "the trial court's duty at that stage was to undertake not a minimal evaluation of the evidence, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge beyond reasonable doubt". In the circumstances, questions arose before the learned judge as to whether, bearing in mind *inter alia* the full import of the Criminal Procedure Code (Amendment) Act 1997, the learned second magistrate had erred in law in applying the *prima facie* standard of proof at the close of the prosecution case, and if so whether the misdirection constituted a misdirection in respect of rules of substantive law such that it could not be cured by s. 422 Criminal Procedure Code. *d* *e* *f* *g* *h*

i

Held:

[1] The instant case concerns acts constituting offences allegedly committed in 1991, well before the date the amendment providing for a *prima facie* standard of proof at the close of the prosecution case was introduced. The test that had to be adopted by the trial magistrate in the case should have been proof beyond reasonable doubt.

[2] It is clear that *Haw Tua Tau v. Public Prosecutor* with its *prima facie* test was the basis of the magistrate's reason for calling the accused to make their defence on the charges. It is also clear that though that was the prevailing view of the law at the time, it was the wrong view. The learned magistrate, in the circumstances, had seriously misdirected herself on the law in finding that the prosecution had proved its case on a *prima facie* basis.

[3] Rules relating to burden of proof are largely rules of substantive law. The serious misdirection herein, thus, was not merely on procedural law but on substantive law. That being so, it cannot be cured by s. 422 of the CPC. This apart, there is also nothing in the contemporaneous record which showed that the learned magistrate had evaluated, on a maximum basis, the evidence before her.

[Convictions and sentences against both appellants on all charges reversed; retrial of appellants on such charges as the Public Prosecutor deems fit.]

Cases referred to:
A Ragunathan v. Pendakwa Raya [1982] 1 CLJ 25 ***(refd)***
Adlan v. Public Prosecutor [1965] MLJ 142 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Bahruni Ismail v. Pendakwa Raya [1997] 3 CLJ 267 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(refd)***
Ishak Shaari v. PP [1997] 3 CLJ 222 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250 ***(refd)***
Surandran Rajaratnam v. PP [1998] 2 CLJ 207 ***(refd)***
Yap Sing Hock v. PP [1992] 4 CLJ 1950 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 60, 92
Criminal Procedure Code, s. 422
Penal Code, ss. 182, 499

For the 1st appellant - Karpal Singh; M/s Karpal Singh & Co
For the 2nd appellant - S Arunan; M/s Rusmah Arunan & Assoc
For the respondent - Stanley Augustin

Reported by WA Sharif

JUDGMENT

KC Vohrah J:

The Criminal Procedure Code ('the CPC') was amended on 30 January 1997 by the Criminal Procedure Code (Amendment) Act 1997 to provide for a *prima facie* standard of proof at the close of the case of the prosecution. This followed Parliament's disagreement with the majority view of the Federal Court in *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1 that the duty of the prosecution at the end of its case is to prove a case beyond reasonable doubt.

It has been held in the Federal Court case of *Bahruni bin Ismail v. PR* [1997] 2 MLJ 2 that the amendment which came into force on 31 January 1997 has no retrospective effect ie, the amendment would have only be applicable to cases filed after that date and not to cases before that date. This has been reiterated in another Federal Court case, *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1 where Peh Swee Chin FCJ stated at 16:

> The said amendment would apply in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test laid down in *Arulpragasan's* case ie, that proof beyond a reasonable doubt at the close of the prosecution's case would still apply. ...

Peh Swee Chin FCJ then proceeded to give the reasons for the court saying so (see the same and the next following one pages); I shall advert to one of the reasons later in this decision.

The case of Arulpragasan in effect provides an exegesis on the differences between proof beyond a reasonable doubt and a *prima facie* case at the end of the prosecution case and critically examines the cases of *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 and *Haw Tua Tau v. PP* [1981] 2 MLJ 49. *Khoo Hi Chiang* dealt with Lord Diplock's test enunciated in the Privy Council case of *Haw Tua Tau* which requires only a minimal evaluation of the evidence at the close of the case of the prosecution to ensure it is not inherently incredible, a test which was adopted in Malaysia by the then Federal Court in *A. Ragunathan v. PR* [1982] 1 MLJ 139 and by the then Supreme Court in *Munusamy v. PP* [1987] 1 MLJ 492. The Supreme Court in *Khoo Hi Chiang*

rejected that test and decided that at the close of the prosecution case the duty of the court is to undertake, not a minimal evaluation of the evidence tendered by the prosecution, but a maximum evaluation of such evidence, to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt.

The instant case under appeal concerns acts constituting offences allegedly committed in 1991, well before the date the amendment providing for a *prima facie* standard of proof at the close of the prosecution case was introduced. The test that had to be adopted by the trial magistrate in the case should have been proof beyond reasonable doubt at the close of the prosecution case.

The hearing of this case against the two appellants (Mohd. Amin @ Kanaperan and Siti Khatijah bt Abdullah @ Mary Anne) at the Kuala Lumpur Magistrates Court commenced on 14 March 1992 before a magistrate.

Siti Khatijah @ Mary Anne faced two charges under s. 182 of the Penal Code for giving false information to police officers with intent to cause them to use their lawful power to the injury of certain persons and seven charges of criminal defamation under s. 499 of the same code in respect of several persons.

Mohd. Amin @ Kanaperan was charged with abetting Siti Khatijah @ Mary Anne in committing the two offences under s. 182. He faced an additional seven charges of criminal defamation under s. 499 of the same several persons allegedly criminally defamed by Siti Khatijah @ Mary Anne.

The magistrate over a period of 6½ months heard 34 witnesses for the prosecution. On 11 January 1993 another magistrate took over the hearing of the case. When the second magistrate took over the hearing, there was an application for a trial *de novo* by counsel for one of the accused on the ground that the new magistrate had had no opportunity to assess the credibility of the 34 witnesses, some of whom were important witnesses, the main complaint being that their demeanour could not be assessed. The magistrate, however, proceeded with the trial and she heard the evidence of an additional 38 witnesses before the prosecution closed its case on 17 May 1993.

When the prosecution closed its case before the second magistrate after the 72nd witness, counsel for each of the accused attacked, *inter alia* the credibility of the prosecution witnesses at length. They both argued that no *prima facie* case had been made out against both the accused. The learned DPP on the other hand argued that a *prima facie* case had been made out and relied on *Haw Tua Tau* and *Munusamy*. At that time the Supreme Court had not given its decision on *Khoo Hi Chiang*.

After the submissions at the close of the case for the prosecution, the learned magistrate on 16 June 1993 called upon both the accused to make their defence on the charges preferred against them. She stated (see Appeal Record, 621):

> Setelah mahkamah mendengar keterangan-keterangan daripada seramai 72 orang saksi serta penghujahan-penghujahan panjang lebar kesemua pihak, mahkamah dapati pihak pendakwaan telah berjaya membuktikan kes *prima facie* ke atas kesemua 18 pertuduhan ke atas OKT1 dan 2.

It is clear that *Haw Tua Tau* with its *prima facie* test was the basis of the magistrates's reason for calling upon the accused to make their defence on their charges. As mentioned before, *Khoo Hi Chiang* requiring proof beyond reasonable doubt at the close of the prosecution case had not been decided yet. *Khoo Hi Chiang* was decided on 24 December 1993.

After the two accused had made their defence both of them were convicted on all the charges.

By the time the learned magistrate gave her grounds on the whole case it was already 27 February 1995, about two years after Khoo Hi Chiang had been decided. There is no doubt, with the benefit of hindsight, she was then well aware of *Khoo Hi Chiang* and she adverted (see Appeal record, Vol 5, 1809) to proof beyond reasonable doubt being required at the close of the prosecution case, but the fact remains that when she made the decision to call the two accused to make their defence the Supreme Court case of *Khoo Hi Chiang* had not been decided as yet and she had clearly in her contemporaneous note written on 16 June 1993 made a finding that the prosecution had proved its case on a *prima facie* basis. The learned magistrate had – and I must state here, that appeared to be the prevailing view of the law at that stage though it was the wrong view – seriously misdirected herself on the law. The serious misdirection was not merely on procedural law but on substantive law. I say the serious misdirection is on substantive law as well because an important right requiring a higher burden of proof on the prosecution, proof beyond a reasonable doubt at the close of the prosecution case on every ingredient of the offences, accrued to the two accused who were charged with the offences in the case. I had earlier adverted to the two reasons which the Federal Court in *Dalip Bhagwan Singh* advanced for holding the CPC amendment relating to *prima facie proof* at the close of the prosecution case being not retrospective. One of the reasons relating to the important right accruing to an accused person where the proof is one beyond a reasonable doubt at the close of the prosecution case is seen in this passage (at 16) by Peh Swee Chin FCJ:

Assuming that the said amendment had been, expressly or by necessity implication, made to apply retrospectively, it would have run foul of art. 7(1) of the Federal Constitution in the manner mentioned below. Article 7(1) reads as follows:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

The said amendment if enacted to operate retrospectively would have so run foul because **if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of the prosecution's case, the perpetrator of the act or omission would not be called for his defence and therefore would not be punishable any more.** But if the act or omission in question not punishable in the way stated above can be proved by way of a *prima facie* case at the close of the prosecution's case (a much lesser burden of proof), then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution's case, and such failure will be punished in a manner as provided by law. Article 7(1) of the Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter. (Emphasis added).

I wish to refer to the decision of Augustine Paul JC in *Ishak Shaari v. PP* [1997] 3 CLJ 222 where he discusses the rules relating to burden of proof and concludes that rules relating to burden of proof are largely rules of substantive law. I agree with his views.

The misdirection being one not merely a procedural one but one on substantive law cannot be cured by s. 422 of the CPC. I would adopt the views of Augustine Paul JC in *Ishak Shaari* where he has dealt extensively with the ambit of s. 422 and the different types of breaches which can be cured under s. 422 and those which cannot and Augustine Paul JC has adverted to *Adlan v. PP* [1965] MLJ 142 where Ong J (as he then was) stated that s. 422 cannot be invoked where there is a breach of "a cardinal principle in the administration of justice". He has also cited the Supreme Court decision in *Yap Sing Hock v. PP* [1992] 2 MLJ where reference was made to "a principle of general importance to the administration of criminal justice" where s. 422 cannot be applied.

The Court of Appeal in *Surandran a/l Rajaratnam v. PP* [1998] 2 MLJ 49 had obviously in mind *Adlan* and *Yap Sing Hock* when Shaik Daud JCA, agreeing with counsel for the appellant that the judge of the Sessions Court had erred in law when he applied the *prima facie* standard of proof at the close of the case for the prosecution, had this to say (at 52):

> We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of the Criminal Procedure Code, as the misdirection involves a principle of general importance on the administration of justice.

Whatever the expressions that can be used to describe the breach, here is a case of a breach of substantive law, not merely of procedural law and s. 422 of the CPC cannot be invoked. Then again, not only was there no maximum evaluation of the evidence, the fact remains that the second magistrate who continued the hearing of the case from the 35th to the 72nd witnesses and who did not see nor hear the earlier 34 witnesses had no duty to critically examine their evidence recorded by the first magistrate against altogether 18 charges so long as there was evidence which was not inherently incredible. There is nothing in the contemporaneous record to show that she evaluated, on a maximum basis, their evidence.

The Federal Court and the Court of Appeal have identical power under the proviso to s. 92 and the proviso to s. 60, respectively, of the Court of Judicature Act 1964 to dismiss the appeal if the court considers no substantial miscarriage of justice has occurred. The High Court has no such power but I wonder if a rule of substantive law relating to an important right requiring a higher burden of proof on the prosecution, proof beyond a reasonable doubt at the close of the prosecution case, accruing to an accused is breached, a substantial miscarriage of justice has not occurred?

Suffice it to say the High Court has no power to act under s. 422. The convictions and sentences against both the appellants on all the charges are reversed. In the interests of justice, however, I order a retrial of both the appellants on such charges as the Public Prosecutor deems fit.